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No. 98-2053

In The

Supreme Court of the United States

FRANK COLACURCIO, JR., DAVID EBERT, AND STEVE FUESTON, D/B/A DDF&S INVESTMENT CO.,

Petitioners,

v.

CITY OF KENT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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14 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

I. THERE IS A LACK OF CLARITY IN THE LEVEL OF FIRST AMENDMENT PROTECTION AFFORDED NON-OBSCENE SEXUALLY EXPLICIT SPEECH 1

II. THERE IS A LACK OF CLARITY ON THE QUESTION OF HOW TO DETERMINE A STATUTE'S "PREDOMINANT INTENT" 4

III. THERE IS A LACK OF CLARITY IN THE INTERMEDIATE SCRUTINY TEST'S NARROW TAILORING PRONG 7

IV. THE ORDINANCE FAILED TO LEAVE OPEN ADEQUATE ALTERNATIVE MODES OF COMMUNICATION 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Federal Cases

Ater v. Armstrong, 961 F.2d 1224 (6th Cir. 1992) 7

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 2, 3

BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986)..... 1

Bay Area Peace Navy v. United States, 914 F.2d 1224 (9th Cir. 1990) 7, 9

Board of Trustees v. Fox, 492 U.S. 469 (1989)..... 7

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 4, 5

Clark v. Community For Creative Non-Violence, 468 U.S. 288 (1983) 7, 9

Doucette v. City of Santa Monica, 955 F. Supp. 1192 (C.D. Cal. 1997) 7

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) 7

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981)..... 10

J.L. Spoons, Inc. v. City of Brunswick, ___ F. Supp. 2d ___, No. 1:99CV0477, 1999 WL 322999 (N.D. Ohio May 20, 1999)..... 1

Krantz v. City of Fort Smith, 160 F.3d 1214 (8th Cir. 1998)..... 7

Marks v. United States, 430 U.S. 188 (1977)..... 3

New Jersey Freedom Org. v. City of New Brunswick, 7 F. Supp. 2d 499 (D. N.J. 1997)..... 7

Pennsylvania Alliance for Jobs and Energy v. Council of Munhall, 743 F.2d 182 (3d Cir. 1984) 9

TABLE OF AUTHORITIES – Continued

Page

Richland Bookmart, Inc. v. Nichols, 137 F.3d 435 (6th Cir. 1998) 3

T-Marc v. Pinellas, 804 F. Supp. 1500 (M.D. Fla. 1992) 1

United States v. O'Brien, 391 U.S. 367 (1968) 5

STATE CASES

City of Colorado Springs v. 2354 Inc., 896 P.2d 272 (Colo. 1995) 3

Collier v. City of Tacoma, 854 P.2d 1046 (Wash. 1993) 9

Ino Ino, Inc. v. City of Bellevue, 937 P.2d 154 (Wash. 1997), *cert. denied*, 118 S.Ct. 856 (Jan. 20, 1998) 1

FEDERAL STATUTES

42 U.S.C. § 1988 2

MISCELLANEOUS

Erwin Chemerinsky, *Constitutional Law* (1997) 5

Supreme Court Rule 15.2 6

INTRODUCTION

In its Opposition, Respondent the City of Kent raises no serious argument to dispute Petitioners' contention that the opinion below conflicts with decisions of this Court and other courts of appeals, and raises important and unsettled questions of First Amendment doctrine.[1]

ARGUMENT

I. THERE IS A LACK OF CLARITY IN THE LEVEL OF FIRST AMENDMENT PROTECTION AFFORDED NON-OBSCENE SEXUALLY EXPLICIT SPEECH

The City argues that review is unnecessary because "this Court has clearly set the level of First Amendment protection for sexually explicit non-obscene expressive conduct." Opp. at 5. Nothing could be further from the truth.[2]

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[1] Respondent argues that this Court should not grant certiorari because no court has ever invalidated a distance requirement under the First Amendment. Respondent is mistaken. *See J.L. Spoons, Inc. v. City of Brunswick*, ___ F. Supp. 2d ___, ___, No. 1:99CV0477, 1999 WL 322999, at *9-10 (N.D. Ohio May 20, 1999), cited in the Petition at 24. Even if Respondent were correct, however, this point would be irrelevant to this Petition. Petitioners are not asking this Court to rule categorically that all distance requirements are unconstitutional. Petitioners argue rather that several important questions of First Amendment jurisprudence, questions that transcend the narrow question of the constitutionality of the City's Ordinance, require clarification from this Court; that this case squarely presents those questions; and that, as applied to the facts of this case, the correct answers to those questions require reversal of the opinion below. Statutes regulating the adult entertainment business lie on a continuum. In comparison to the cases the City cites, cases involving either prohibitions on *nude* table dancing only, *see, e.g., BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986), or lesser setbacks, *see, e.g., T-Marc v. Pinellas*, 804 F. Supp. 1500 (M.D. Fla. 1992), the City of Kent's Ordinance is the most restrictive provision ever upheld.

[2] To support this proposition, the City states that "this Court has already refused review of a Washington State Supreme Court decision which decided the very issues presented by Petitioners," referring to *Ino*

First, the Ninth Circuit explicitly recognized the law's lack of clarity. *See* Pet. at 6-7. The City may believe the law is crystal clear, but it is obviously mistaken when it says that "[t]he *only* confusion occasioned by *Barnes* appears to be visited upon the Petitioners." Opp. at 10 (emphasis added). At the very least, the Ninth Circuit too was confused and suggested that only this Court could provide guidance on this question.

Second, the City ignores, as did the Ninth Circuit below, the distinction between nude dancing in particular and erotic dancing in general. The City argues that this Court need not accept review because "courts have uniformly applied time, place, manner analysis . . . to *nude* dancing." Opp. at 7 (emphases added). The Ninth Circuit likewise assumed that this case was about nude dancing. *See* Pet. at A-4 to A-7. But it is not. Rather, the Ordinance being challenged here prohibits table dancing *even when the dancer is wearing both halves of an opaque bikini*. Though table dances are invariably sexually explicit, the dancers need not be nude. Indeed, the City's predecessor Ordinance prohibited nude table dancing but permitted table dancing with a full bikini. *See* Pet. at 2. Petitioners never challenged that statute and were prepared to establish their business under such a legal regime. It was only when the City imposed a complete ban on all table dancing, including table dancing with a full bikini, that Petitioners brought this lawsuit. Petitioners can only speculate that the confusion occasioned by *Barnes* has so infested the law that it has even confused the City of Kent about the scope of its own statute.

Ino, Inc. v. City of Bellevue, 937 P.2d 154 (Wash. 1997), *cert. denied*, 118 S.Ct. 856 (Jan. 20, 1998) (No. 97-858). Opp. at 14. However, the only two questions presented by the *Ino Ino* petition were (1) whether the Washington practice of awarding attorneys' fees to a defendant who prevails in dissolving a temporary restraining order is preempted by 42 U.S.C. § 1988, and (2) whether the petitioners therein were entitled to attorneys' fees under section 1988 when they prevailed on their state constitutional claims. The Court's denial of the *Ino Ino* petition thus has no bearing on this case.

Third, the City is simply wrong when it asserts that "[c]ases have assumed full protection for sexually explicit non-obscene speech." Opp. at 5. The Ninth Circuit did not. *See* Pet. at A-4 to A-7; *id.* at A-26 (Reinhardt, J., dissenting); *id.* at 11. Nor have a myriad of other courts. *See* Pet. at 9-10. Indeed, some courts have clearly stated the view that this Court's cases have created "a kind of legal fiction" that regulations of adult entertainment are automatically content-neutral. *See Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998); *see also City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 294 n.16 (Colo. 1995). Indeed, Respondent effectively concedes this point when it says that "courts have uniformly applied time, place, manner analysis applicable to protected expressive conduct to nude dancing." Opp. at 7. Such a comment unmasks Respondent's view (shared by many courts) that *any* regulation of erotic dancing should automatically be subject to time, place, and manner analysis even when content-based on its face and in its effects.

Finally, the City completely misunderstands Petitioners' reason for discussing Justice Scalia's position in *Barnes*. Opp. at 8-9. Petitioners do not claim that Justice Scalia's opinion is law. Rather, Petitioners contend that courts have incorrectly treated Justice Souter's opinion as being the "fifth vote" (and therefore the holding of *Barnes*) because they have misunderstood Justice Scalia's opinion. Under the "narrowest grounds" rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), Justice Souter's opinion would be the holding of *Barnes* only if his opinion had been the "narrowest," in that five votes are necessarily included within his opinion. A proper reading of Justice Scalia's opinion, however, demonstrates that his vote is not included within Justice Souter's. Therefore, Justice Souter's rationale for upholding Indiana's public indecency statute cannot properly be treated as the holding of *Barnes*. Quite simply, when properly read, *Barnes* leaves citizens and courts without a holding and with law that is unclear.

II. THERE IS A LACK OF CLARITY ON THE QUESTION OF HOW TO DETERMINE A STATUTE'S "PREDOMINANT INTENT"

The City's argument with respect to the second question presented by this Petition contains four separate errors. First, the City completely ignores the Circuit split on this question. *See* Pet. at 17-20. The City simply asserts that courts have not "varied greatly in their analysis of the issue," Opp. at 16-17, and yet makes no attempt to engage the wide disparities in caselaw cited by Petitioners.

Second, the City ignores the subtleties in the law. The City does not dispute that this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), requires courts to determine a statute's "predominant intent" -- nor could it, since this is so obviously the law. Instead, the City claims that the law is crystal clear. According to the City, "a court should consider whether an ordinance is actually designed to further a legitimate, enunciated government purpose." Opp. at 16. But, such a characterization simply begs the question on which Petitioners seek certiorari; namely, "How does a court determine whether an ordinance is 'actually designed' to further a legitimate purpose?" According to the City, a regulation expressly aimed at a particular form of expressive activity must be deemed content-neutral as long as a municipality can merely produce a study showing the existence of a non-speech related problem. Indeed, notwithstanding some discussion to the contrary, this is ultimately what the Ninth Circuit held. *See* Pet. at 20. Under this reasoning, it is irrelevant how much evidence a statute's challenger might provide to demonstrate that a statute was "actually designed" to suppress expressive activity, as long as the municipality provides *some* evidence of "secondary effects." Such a standard must be wrong because it permits no inquiry whatsoever into even the objective factors surrounding the passage of a piece of legislation. In any event, the City simply ignores the difficulties courts have in determining the standards "for determining when an illicit but inconsequential 'motivating factor' . . . develop[s] into an illicit and controlling

'predominant purpose.' " Pet. at A-10 (citing Erwin Chemerinsky, *Constitutional Law* § 11.3.4.4, at 840 (1997)). This case presents a perfect example of a situation in which almost all the evidence points to the conclusion that the Ordinance was designed to ban a particular form of expressive activity because of disagreement with the message being conveyed; and yet, because the City was able to point to a fifteen-year old study and an affidavit, the court below abdicated its responsibility to determine the Ordinance's "predominant intent."[3]

Third, the City ignores the fact that Petitioners' evidence consisted primarily of objective facts surrounding the passage of the Ordinance and its actual effect. *See* Pet. at 13 n.6; *id.* at 20. The City spends more than three pages of its brief simply reiterating the standards announced in *O'Brien*. *See* Opp. at 15-18. But Petitioners do not dispute the validity of *O'Brien* – nor need they do so in order to prevail in this case.[4] Rather, Petitioners argue simply that this Court's jurisprudence is not as straightforward as the City contends and that an appropriate inquiry would lead to the conclusion that the "predominant intent" of the ten-foot distance rule was to effect a complete ban on table dancing in order to exclude adult entertainment establishments from the entire city. Indeed, the City simply ignores those cases cited on pages 16 and 17 of the Petition, cases in which this Court has made clear that courts must look beyond the government's *articulated* justification when determining whether a law is content-neutral, even if the law is

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[3] Indeed, under the City's view, it does not matter whether the "secondary effects" study is based upon invalid conclusions, unreliable data, or even patent falsehoods. Under this constricted view of the First Amendment, almost any conceivable regulation can be justified by reference to the same study proclaiming the existence of secondary effects.

[4] In any event, *O'Brien* is clearly distinguishable. *O'Brien* dealt with a generally applicable statute, which did not apply on its face to speech; there was therefore no inherent reason to question the legislative purpose. In contrast, the City of Kent's ten-foot distance rule applies only to expressive activity. Where a law aimed directly at expression is being challenged, legislative purpose is the central inquiry. *See Playtime Theatres*, 475 U.S. at 47.

neutral on its face. Instead, the City persists in its simplistic view that it need merely articulate a non-speech related justification for its statute, submit a "secondary effects" study to the court, and confidently expect to survive the intermediate scrutiny test.

Finally, in Part III.B of its Opposition, the City is wrong in its claim that the Ninth Circuit looked to the full record. Even a cursory read of the opinion demonstrates that the court failed to consider certain aspects of the record. No part of the Ninth Circuit's opinion addresses several of the objective facts indicating a content-based purpose that Petitioner alludes to on page 20 of the Petition. The mere incantation that a court has looked at the "full record" can hardly be sufficient when First Amendment rights are at stake.[5]

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[5] In footnote 1 of the City's Opposition, the City claims that Petitioners have misrepresented the evidence below. The City is wrong. The City does not contest that the McLaughlin declaration found at Appendix E of the Petition is a true copy of evidence submitted to the courts below. Rather, the City contends that the McLaughlin declaration itself misstates certain facts about the legislative record and that, because Petitioners rely on the McLaughlin declaration, "Petitioners have misrepresented evidence below." Opp. at 2 n.1. The City obviously misunderstands the role evidence plays in a lawsuit and the purpose of Supreme Court Rule 15.2. The City may not, at this stage of the proceedings, claim that uncontested evidence in the record is inaccurate simply because its lawyers say so in a brief. The City failed to submit any evidence in the district court to support its current claim and is therefore estopped from arguing based on facts it failed to submit below. The City may not use Supreme Court Rule 15.2 to submit new "evidence" to this Court. In any event, this case was appealed from a grant of summary judgment in favor of the City. Therefore, even if there had been a dispute below as to whether the April 10, 1995 meeting involved the Planning Commission or the Planning Committee, the district court would have been required to resolve that question in Petitioners' favor.

III. THERE IS A LACK OF CLARITY IN THE INTERMEDIATE SCRUTINY TEST'S NARROW TAILORING PRONG

The City's argument with respect to the third question presented by the Petition is two-fold. First, the City argues that the "reasonable fit" language is inapplicable to non-commercial speech cases because many of the commercial speech cases involved content-based regulations. Second, the City argues that, even if the Ninth Circuit had required the Ordinance to pass muster under the more stringent "reasonable fit" test, the result would have been the same. The City is wrong on both counts.

The City's first argument suffers from three fundamental flaws. First, it ignores the fact that commercial speech has generally received less First Amendment protection than non-commercial speech. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). Second, it ignores the fact that this Court has explicitly stated that "the application of the [commercial speech] test [is] substantially similar to the application of the test for validity of time, place, and manner restrictions upon protected speech." *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (internal citation omitted). Third, in contrast to the Ninth Circuit in this case, many lower courts have applied the "reasonable fit" test specifically in "time, place, and manner" cases not involving commercial speech. *See Krantz v. City of Fort Smith*, 160 F.3d 1214, 1221 (8th Cir. 1998); *Ater v. Armstrong*, 961 F.2d 1224, 1229 (6th Cir. 1992); *cf. New Jersey Freedom Org. v. City of New Brunswick*, 7 F. Supp. 2d 499, 509 (D. N.J. 1997); *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1205 (C.D. Cal. 1997). This Court should grant certiorari in this case to make clear that the "reasonable fit" test is equally applicable to the *O'Brien/Ward* line of cases in general and to sexually explicit expressive activity in particular.

The City's second argument is also flawed. First, the City ignores that the burden of proving the "narrow tailoring" prong is on the government. *See, e.g., Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990) (citing *Clark v.*

Community For Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984)). The Ninth Circuit, in the case below, made the exact same mistake: "[Petitioners] have failed to present evidence showing that a ten-foot rule burdens substantially more expression than necessary to achieve its purpose." Pet. at A-17. The City had the burden to show that the ten-foot rule bears a "reasonable fit" to a legitimate goal, and it failed to do so. Second, the City ignores the obvious less-burdensome alternatives (which the Ninth Circuit likewise either ignored or improperly treated as insufficient). Besides the no-touch rule, *see id.* at 23-24,[6] the City could have increased enforcement of prostitution and drug laws. If preventing the secondary effects of table dancing – namely, prostitution and drug solicitation – had really been the City's "predominant purpose," such increased enforcement would have been a more direct manner of accomplishing its goal. That a law imposing a complete ban on a form of expressive activity would make it "easy" to enforce pre-existing laws, *see* Opp. at RA 198 ¶ 7, can hardly be sufficient to sustain its constitutionality under the "narrow tailoring" test.

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[6] The Ninth Circuit concluded that the "no touch" rule was not a reasonable alternative for two reasons: one, because it would "permit verbal communication between dancers and patrons, thereby failing to curtail propositions for drugs or sex"; and, two, because it would be unenforceable as it would "fail to provide sufficient line-of-vision for law enforcement personnel." Pet. at A-17. As noted in the Petition, the court's first rationale, if left to stand, would raise serious overbreadth problems. *See* Pet. at 24. The second rationale is equally specious. As the City's own evidence demonstrates, the no-touch rule could easily be enforced by undercover officers posing as customers. *See* Opp. at RA 198 ¶ 7 (acknowledging that violations are not difficult to detect when "the officer is participating in a table dance in an undercover capacity"). Indeed, the City's primary evidence of the secondary effects associated with table dancing were based on observations made by undercover officers. *See id.* at RA 197 ¶ 4.

IV. THE ORDINANCE FAILED TO LEAVE OPEN ADEQUATE ALTERNATIVE MODES OF COMMUNICATION

The thrust of the City's argument as it relates to the Petition's fourth question is that the fact that table dancing is a unique mode of expression does not, by itself, entitle table dancing to protection from laws that effect a complete ban on such expression. The City's argument fails to undermine Petitioners' contentions for two fundamental reasons.

First, the burden of proof on this question is on the government. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1226 (9th Cir. 1990); *Collier v. City of Tacoma*, 854 P.2d 1046, 1057 (Wash. 1993); *see also Pennsylvania Alliance for Jobs and Energy v. Council of Munhall*, 743 F.2d 182, 193-94 (3d Cir. 1984) (Becker, J., dissenting). Yet, the City utterly fails to point to a single shred of evidence that there are alternative avenues of communicating the same message or to anything in the Ninth Circuit opinion doing so either. Opp. at 29. Instead, as noted in the Petition, the Ninth Circuit chose to analogize table dancing to lap dancing, thus demonstrating its view that the expression embodied in table dancing is itself proscribable sexual conduct. *See* Pet. at 27-28.

Second, Petitioners do not dispute that uniqueness alone is insufficient to entitle table dancing to separate First Amendment protection. Petitioners do not contend that, were there in fact alternative modes of communicating the same message, table dancing could not be restricted. Rather, Petitioners argue simply that there are no alternative avenues for the protected expression. Given the uncontroverted evidence in the record that table dancing and stage dancing express fundamentally different messages, erotic stage dancing is obviously not an alternative means of communicating the ideas expressed in erotic table dancing. Given that stage dancing does not satisfy the requirement, the question, then, is whether the absolute ban on table dancing leaves open *any* adequate alternative avenues for expressing the same message. As the City itself acknowledges, in both of the primary cases on which it relies, *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 294-95

(1983), and *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 654-55 (1981), the Court *expressly* found that alternate means of communicating the message existed, *explicitly stating what those means were*. *See* Opp. at 27-28. In marked contrast, the Ninth Circuit below fails to articulate any other way in which the table dancer can convey her message.[7]

CONCLUSION

This Petition presents four important questions of First Amendment doctrine, each of which raises independent grounds for this Court to hear this case. For the reasons stated in the Petition and this Reply Brief, Petitioners respectfully request that this Court grant the Writ.

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[7] This is not surprising, for it illustrates another fundamental difference between this case and the cases cited on pages 26 through 29 of the City's Opposition. All the cases cited by the City involve media of communication designed to convey a political or religious message. In contrast, table dancing is more akin to artistic expression. In the arts, the medium and message are so closely intertwined that banning the medium is tantamount to banning the message itself. Analogous examples might be a regulation prohibiting tap dancers from wearing taps on their shoes or one that prevents opera singers from singing arias.